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CASE NO.

SUPREME COURT OF THE UNITED STATES
October Term 1981

EFRAIN FIGUEREDO, et al,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent

CERTIORARI TO THE DISTRICT COURT
OF APPEAL OF FLORIDA
THIRD DISTRICT

PETITION FOR CERTIORARI

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SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

EFRAIN FIGUEREDO, et al,
Petitioners,

vs.

SOUTH FLORIDA BEVERAGE CORPORATION,
Respondent

I.

QUESTIONS PRESENTED

1. In a private class action[1] to enforce the overtime pay provisions of the Fair Labor Standards Act, what right does the state appellate court have to reverse the trial court's substantiated finding of fact that petitioners' normal non-overtime work period was eight hours?

2. In the absence of an explicit agreement, is a weekly pay calculated on the theory that permanently employed delivery truck drivers are paid a daily wage to cover all hours of employment appropriate where the daily schedule is controlled by the employer?

II.

INDEX TO PETITION AND CASES

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American Railway Express Co. v. Levee, 263 U.S. 19
Brennan v. Elmer's Disposal Service Inc., 510 F. 2d 84 (9 Cir. 1975)
Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697

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1. The sixty-three individual plaintiffs are listed in Appendix, p. 50.

Harris v. Penn. R.R., 361 U.S. 15
Norris v. Alabama, 294 U.S. 587
Perma Life Mufflers v. International Parts, 392 U.S. 134
Shaw v. Shaw, 334 So.2d 13 (Fla. 1976)
Skidmore v. Swift & Co., 323 U.S. 134
Westerman v. Shell's City Inc., 265 So.2d 43 (Fla. 1972)
Wilkerson v. McCarthy, 336 U.S. 53

III.

JURISDICTION

The Florida Third District Court of Appeal decision, dated December 22, 1981 (App. 12) is reported at 409 So. 2d 490. Certiorari was denied by the Florida Supreme Court in an as yet unreported per curiam decision, one judge dissenting, dated May 28, 1982 (App. 27).

Jurisdiction is conferred on this court by 28 U.S. Code 1257 and the rule of *American Railway Express Co. v. Levee*, 263 U.S. 19 that the time for filing here is computed from the date the Florida Supreme Court refuses to accept its discretionary jurisdiction.

IV.

PERTINENT STATUTE

This case concerns the application of the term "regular rate" mentioned in Section 7 of the Fair Labor Standards Act, 29 U.S.C. §207 (App. 49) to the trial court's finding of fact.

V.

STATEMENT OF THE CASE

Plaintiffs were employed as delivery truck drivers for a Pepsi-Cola distributor. Each morning plaintiffs were given specific assignments where to make their deliveries (App. 43). The standard instruction was that the assigned deliveries must be completed prior to their returning to the bottling plant (App. 43). Plaintiffs did no selling.

Plaintiffs were hired pursuant to the terms of two consecutive union collective bargaining agreements. Each provided a

weekly base pay and "the regular work week shall be Forty Hours consisting of 5 consecutive eight-hour days beginning Monday and ending on Friday."[2] The first contract further provided that overtime shall be based on the fluctuating weekly salary provided for in the Wage and Hour Interpretative Bulletin, 29 C.F.R. §778.114. Overtime under the second contract was to be paid at straight time. The actual practice, however, was to pay wages weekly, not in accordance with the contracts, but based on the assumption that plaintiffs earned a daily wage of one-fifth their stated weekly base wage to cover all hours necessary to complete the job (App. 38, 24).

Pepsi never advised plaintiffs that the forty-hour provision found in both contracts was changed in the calculation of their pay to a daily wage to cover all hours (App. 39, 40, 44).

Plaintiffs who worked five days invariably worked longer than forty hours (App. 44, 45, 47). Overtime was paid under the first contract at half time called "Chinese overtime" because the longer a plaintiff worked the less his regular rate was computed to be. Overtime under the second agreement was straight time. Overtime was paid even when plaintiffs worked less than five days and hence less than forty hours, when plaintiffs' total hours exceeded eight times the number of days worked, even though Pepsi knew such "overtime" payments were not required by the F.L.S.A. (App. 38, 39).[2a]

Immediately after plaintiffs complained to the Wage Hour Board, Pepsi began paying time and a half wages after forty hours (App. 44) and plaintiffs filed a class action (App. 28) to recover three years of underpaid overtime wages due them under the Fair Labor Standards Act.

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2. This clause of the agreement is included in the district court opinion and, together with the hourly pay provisions relating to longevity pay increases and reporting and call in pay, are at Appendix, p. 34.

2a. An employee who worked 38 hours in four days would be paid six hours overtime at half time under the initial contract and at straight time under the second contract.

In a non-jury trial the judge entered an order on final hearing (App. 24) that plaintiffs were entitled to time and a half for overtime, finding inter alia:

2. The plaintiffs were hired in accordance with the terms of written employment agreements, entered July of 1975 and again in July of 1978, each of which provides that the regular work week is forty hours, consisting of five consecutive eight-hour days and for weekly pay. The "regular rate" for each plaintiff is his weekly pay specified in the employment agreement divided by 40.

3. The defendant's calculation of wages for work in excess of forty hours between June 8, 1976 and March 2, 1979 was based on the assumption that daily wages equal to one-fifth of the weekly wage stated in the contract was to cover all of the hours which plaintiffs were required to work during the day.

* * *

6. The normal non-overtime work period established by the defendant for these plaintiffs was eight hours in a day and forty hours in a week.

7. The "regular rate" for each plaintiff is his weekly pay specified in the employment agreements divided by 40.

These findings were based on the following evidence:

1. Pepsi's expert witness testified the plaintiffs were paid on a daily basis *and daily overtime* even when employed less than forty hours (App. 38).

The Witness:

A. These employees were paid on a daily basis with overtime, daily overtime on multiples of eight, and weekly overtime over forty hours.

The Court: Were they paid overtime also—I see, even when it was less than forty hours. Overtime was being paid; is that right—on multiples of eight hours a day?

The Witness: Yes Sir.

The Court: And there is no statutory obligation to do that, is that what you are saying?

The Witness: No sir, not under the Fair Labor Standards Act.

The Court: Pepsi just did it as a generous gesture?

The Witness: It is an inference that I can't support with anything in the record. I don't know whether there were instructions to that effect or whether it was just because of the computer programming. I just don't know.

2. Pepsi's comptroller who admitted defendant computed and paid "overtime" each day after eight hours though plaintiffs may have worked less than forty hours in the week (App. 39).

3. Pepsi's personnel manager testified that the normal non-overtime work week was determined by the union agreement (eight hours) and that plaintiffs were not hired on a daily basis. (App. 42).

4. Pepsi's failure to offer in evidence any written company wage policy instructions, statements or memoranda that Pepsi intended to pay wages based on a daily wage for all hours worked (App. 38, 41).

5. Plaintiffs' testimony that they were hired to work under the terms of the union agreement (App. 43) and not advised of any changes (App. 44).

6. The plaintiffs' expert witness, the admissibility of whose testimony was not challenged on appeal, that defendant actually computed wages on an hourly rate and did not pay a daily wage (App. 45).

7. The written collective bargaining agreements.

The district court of appeal ignored all the testimony and limited its discussion solely to one aspect of the written collective bargaining agreements.

The trial judge's ruling was, and on this record could have been based only upon the single isolated sentence in the

> collective bargaining agreement "the regular work week shall be FORTY HOURS consisting of five consecutive eight-hour days beginning on Monday and ending on Friday."

and ordered the complaint to be dismissed because half time for overtime was appropriated when applied to the fluctuating work day.

> The situation involved here is precisely treated in 29 C.F.R. §778.112 (day rates and job rates) * * * This result is exactly the same as the one applied in 29 C.F.R §778.114 to the analytically identical but more common situation of a guaranteed or fixed *weekly* allowance for fluctuating hours (emphasis in original).

The district court further found that plaintiffs had ratified the actual pay practice.

> The proper resolution of any inconsistencies which may arguendo exist in this agreement, like any other, is best determined by the manner in which the parties actually performed under it. *Brooklyn Life Ins. Co. of New York v. Dutcher*, 95 U.S. 269, 24 L.Ed. 410 (1877); *Lalow v. Codomo*, 101 So.2d 390, 393 (Fla. 1958); *4 Williston, supra* Sec. 623. As to this important factor, there is no doubt that everyone, without issue, dispute or complaint, treated the agreement as one which called for the overtime specifically agreed to, not the one required by the ex post facto application of the "forty hour work week" clause.

Plaintiffs sought certiorari in the Florida Supreme Court on the grounds that the district court improperly reweighed the evidence in violation of settled Florida law[3] and as such was an express conflict of decisions giving the supreme court jurisdiction.[4] The supreme court denied certiorari without opinion, one judge dissenting (App. 27).

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3. *Shaw v. Shaw*, 334 So.2d 13 (Fla. 1976) and *Westerman v. Shell's City Inc.*, 265 So.2d 43 (Fla. 1972).

4. Florida Constitution, 1980 Amendment, Art. 4§3.

VI.

ARGUMENT

This Court has historically granted certiorari when the question involves application of United States laws to the facts in question,[5] and state appellate courts have rejected trial courts' findings of fact[6] or failed as here to consider the evidence,[7] especially when private enforcement may be necessary to effectuate the public purpose.[8]

The interpretative bulletin §778.108 is clear that the "regular rate" is "the hourly rate actually paid the employee for the normal, non-overtime work week." The trial judge found that the normal non-overtime period was eight hours because Pepsi had no written company wage policy instructions, statements or memoranda showing that Pepsi intended from the start to pay wages based on a daily wage for all hours worked, and the daily wage claim was totally refuted by Pepsi's payment of daily overtime when plaintiffs worked less than forty hours. The district court never discussed these facts or the other testimony relied upon by the trial court.

The district court's citation to 29 C.F.R. 778.114 in support of its opinion is unconscionable because 778.114 specifically requires that the fluctuating wage formula is not applicable "unless the employee clearly understands that the salary covers whatever hours the job may demand." The closest case factually on point and argued in the district court is *Brennan v. Elmer's Disposal Service Inc.*, 510 F. 2d 84, 88 (9 Cir. 1975) which discussed this requirement and the concept of waiver relied upon by the district court. The court noted:

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5. See *Norris v. Alabama* 294 U.S. 587.

6. See *Wilkerson v. McCarthy* 336 U.S. 53 and *Harris v. Penn. R.R.* 361 U.S. 15 regarding Federal Employers Liability Act.

7. *Brooklyn Sav. Bank v. O'Neil* 324 U.S. 697 concerning the FLSA.

8. See *Perma Life Mufflers v. International Parts* 392 U.S. 134 regarding anti-trust actions.

> Appellant would have this court infer from certain elements of its wage plan and wage practices that an agreement was reached between itself and its employees concerning the designated rate. * * * Appellant has failed to present any evidence of negotiation or agreement concerning the regular rate of compensation it paid to its employees. That the employees did not complain of the plan is not sufficient to support a finding that the designated rate was the "regular rate" described by the statute or that the employees agreed to the designation made by appellant. Although the employees may have been aware of the rate designation because it showed on the paycheck stubs, the cases and the statute require an explicit agreement and none was proven in this case. * * *
>
> Finally, while not a necessary element of the Secretary's case, the fact that appellant docked absent employees a flat one-sixth of the fixed weekly wage for each day missed without reference to hours worked tends to strengthen the conclusion that this wage plan violates the Adt's overtime provisions. *149 Madison Avenue Corp. v. Asselta,* 331 U.S. 199. For example, an employee would lose as much for the second day's absence as for the first, although the first might result in a reduction in the overtime hours and the second might not.

See also *Skidmore v. Swift & Co.,* 323 U.S 134 discussing the respect which courts should give administrative interpretations.

Nor has any case heretofore held that the fluctuating daily or weekly wage concept is appropriate when the work schedule is controlled by the employer. See the analogous provision of 29 C.F.R. 778.405 that the fluctuating principle is not applicable when the employer can control or anticipate the number of hours of employment or when the duties do not necessitate significant variations in weekly hours.

The trial judge was not a fool. He realized that Pepsi saved hundreds of thousands of dollars[9] by blatantly substituting the

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9. See Exhibit 13, App. 47 showing underpayment of $442.64 for one representative plaintiff during seven representative weeks.

agreements' forty-hour provision with an unlimited hour concept without an explicit agreement, and in circumstances where a fluctuating day concept was not factually appropriate. Pepsi's flaunting of the contract and manipulation of the interpretative rules, with or without tacit union support, are the precise practices the FLSA was designed to prevent.

Private resort to the state courts in the Southern District of Florida to recover back wages required by the FLSA will be necessary as long as the Federal docket here is congested with drug cases,[10] and in the circumstances here, the Wage and Hour division need not be concerned with future enforcement of the Act because Pepsi was in compliance after the administrative complaint.

Theoretically, state courts should be as competent to judge federal rights as are the federal courts. As a practical matter, however, this case illustrates that at least this state court, as shown by its citations to federal rules and cases out of context and reliance on state contractual law, lacks the experience to appreciate the national purpose of the Fair Labor Standards Act. The reason for its hostility is not apparent, but the only way to insure that this tampering does not happen again in a state court is for this Court to strongly tell the state judicial systems that they can only earn this Court's respect by their faithful adherence to federally guaranteed rights.

Respectfuily submitted,

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10. Justice Berger's administrative order of March 23, 1982, assigning four visiting judges here, and the April 1982 report issued by the Administrative Office of the United States Courts acknowledge this problem.